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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 983

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, RESPONDENT.

RESPONSE TO PETITION FOR CERTIORARI

May it Please the Court:

The facts of this case are excellently stated in the opinion of the Court of Appeals of Kentucky in the case of C. & O. Railway Company vs. Stapleton's guardian, 223 Ky., 154; 3. S. W. (2nd) 209, (Advance Sheets). It is sufficient to say that the only question raised by petitioner is whether or not the employment of an infant by an inter-state carrier in violation of

a State Statute forbidding the employment of children under certain ages is sufficient evidence of negligence within the meaning of the term used in the Federal Employers' Liability Act, and whether or not such unlawful employment is sufficient evidence of negligence to authorize a recovery in action brought under the provisions of the Federal Employers' Liability Act to recover damages for injuries sustained by an infant while so employed in open violation of law by an inter-state carrier.

It is earnestly submitted for the respondent that in such a state of case the employment of an infant when prohibited by statute is not only negligence within the meaning of the term as used in the Federal Employers' Liability Act, but that it is negligence per se. The opinion of the Court of Appeals of Kentucky in this case expressly follows the case of Frese vs. Chicago B. & Q. R. Co., 236 U. S. 1; 44 Sup. Ct., 1; 48 L. Ed. 138, from which this case is not distinguishable, and we might well rest our brief in this case with a citation of that case, as we earnestly submit that it is a direct answer to the question raised by petitioner, and is conclusive of the question herein presented.

In that case it appeared that the plaintiff, an engineer was injured in a collision. He sued the railroad company under the Federal Employers' Liability Act. The evidence disclosed that the injury occurred in the State of Illinois, and that at the time of the accident there was a statute in force in that State which read as follows:

> *"All trains running on any railroad in this state when approaching a crossing with another railroad in this state upon the same level or when approaching a swing or draw bridge in use as such, shall be brought to a full stop before reaching the same and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is cleared".*

The evidence showed that the engineer who was the plaintiff in the action did not ascertain that the way was cleared before entering upon the crossing. In denying a recovery to the plaintiff in that case for a failure to observe the statute the Court said:

> *"Moreover the statute makes it the imperative duty of the engineer to positively ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty for it would be a perversion of the Federal Employers' Liability Act to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more".*

In concluding the opinion in that case the Court said:

> *"There is not doubt that the Statute of Illinois applied to this case".*

We earnestly submit that for the same reasons, as stated in the case supra, the Kentucky Statute relied on by respondent applies to the case at bar. It was

a violation of a penal law for the petitioner to employ respondent; its disregard of the Statute was negligence per se. In the case supra the plaintiff was denied a recovery because he violated a statute, and this violation of the statute was held by the Court to constitute negligence as a matter of law. In the case at bar the admitted and conceded violation of section 331 a-9 Kentucky Statutes, by petitioner, is negligence per se under the Federal Act.

In the case supra this Court is announcing no new doctrine as it is now well established that the employment of an infant in violation of a state statute is negligence per se.

Thompson on Negligence, Vol 1, Page 10
Elk Cotton Mills vs. Grant, 140 Ga. 727; 79 S. E. 836; 48 LR. A. (N. S.) 656.
Clark vs. Wells-Elkhorn Coal Co., 215 Ky., 128; 284 S. W. 91.
L. & N. R. R. Co. vs. Lyons, 155 Ky., 316; 151 S. W. 971.

In the cases of Minneapolis-St. Louis R. R. Co., vs. Bornfolis, 241 U. S. 211; 36 Sup. Ct., 595; 60 L. Ed. 961, and C. & O. Railway Co. vs. Carnahan, 241 U. S. 241; 36 Sup. Ct. 594; 60 L. Ed. 979, it was held that certain statutes referred to in those opinions were applicable to actions brought under the Federal Employers' Liability Act. We do not think that these cases can be distinguished from the case at bar.

Petitioner criticises the ruling announced by the Court of Appeals of Kentucky in the case of C. N. O. & T. P. R. R. Company vs. Swan, 160 Ky., 458; 169

S. W. 886, and insists that it is in conflict with opinions delivered by this Court. We submit that the doctrine announced in the Swan case is a sound interpretation of the Federal Employers' Liability Act. Nor is it in conflict with any decisions from this Honorable Court. We say this, mindful of the three opinions which petitioner cites in its petition for certiorari, but when these cases are carefully read and studied, it will at once be seen that there is no conflict between the cases.

It is also maintained by petitioner that section 331 a-9 commonly known as the Kentucky Child Labor Statute, is superseded by the Federal Employers' Liability Act, but we direct the attention of the Court to the most potent fact emphasized in all the opinions of this Court on this subject that the Federal Act supersedes the State Statutes only where it is in conflict with the State Statute. This principle was followed and adopted by this Court in the case of Seaboard A. L. R. Co. vs. Horton, 233 U. S. 142; 34 Sup. Ct. 635; 58 L. Ed. 262, relied on by petitioner. In that case the following instruction given to the jury by the trial court was approved:

> "*Where the Federal Act is in conflict with the State Statute then the state law is superseded but if there is no conflict expressed by the statute of the United States, then the rule of the State prevails*".

Where, we ask, is the conflict between the Kentucky Child Labor Statute and the Federal Employers' Liability Act? There is no federal legislation regulating

child labor and in such a situation it is well settled that the silence of Congress on this subject permits the several states to enact laws on the subject.

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Missouri Pacific R. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612; 53 L. Ed. 352.

The mere grant to Congress of the power to regulate would not imply a prohibition on the States to exercise the same power; it is not the mere existence of such a power, but its exercise by Congress which may be incompatible with the exercise of the same power by the States.

Missouri Pacific R. R. Company vs. Larabee Flour Mill Co., 211 U. S. 612; 29 Sup. Ct. 214; 53 L. Ed. 352.

In the case of Salabrin vs. Ann Arbor R. R. Company, 194 Mich., 458; 160 N. W. 552, it was held that the violation by an inter-state carrier of a State Statute requiring all engines to be equipped with head lights was sufficient evidence of negligence to authorize a recovery in a suit brought under the Federal Employers' Liability Act.

Again in the case of Pennsylvania Co. vs. Stalker, (Ind.) 119 N. E. 163, it was held that the violation of a municipal ordinance by an inter-state carrier was sufficient evidence of negligence to authorize a recovery in an action brought under the Federal Act. In that case it is said in the opinion:

"The federal statute declares that employers within its scope shall be liable for negligence. It

does not specify what shall constitute negligence, but leaves that question to be determined in accordance with the established rules of law on that subject".

But the petitioner relies on the case of Seaboard A. L. R. Co. vs. Horton, 233 U. S. 492; 34 Sup. Ct. 492; 58 L. Ed. 1,062, but we earnestly submit that this case does not support its contention. In that case Horton, an engineer brought suit under the Federal Act to recover for an injury sustained by him. His engine was delivered to him without a guard glass, which was used for the purpose of preventing an explosion. The injury occurred in the State of North Carolina, and by the law of that state any person suffering injury by reason of a defect in the machinery or appliances of the company was entitled to maintain an action therefor. The lower court instructed the jury that the failure to furnish the guard glass was negligence.

A careful reading of this case will clearly show that the Court went no further than to hold that the Federal Act superseded the North Carolina Statute, because the Statute was in direct conflict with the Federal Act. By the terms of the State Statute a recovery could be had by any person injured by any defective appliance regardless of negligence. Under the Federal Act for such an injury negligence must be established. In the case at bar the employment of respondent by petitioner is negligence per se, and there is no conflict between the two statutes.

The cases of New York Central Railroad Company vs. Winfield, 244 U. S. 147; 37 Sup. Ct., 546; 61 L. Ed.

1,045; Erie R. Co. vs. Winfield, 244 U. S. 170; 37 Sup. Ct., 556; 61L. Ed. 1,057; New York Central Railroad vs. Porter, 249 U. S. 168; 39 Sup. Ct. 188; 63 L. Ed., 536 and Southern Pacific Company vs. Industrial Accident Co., 251 U. S. 259; 40 Sup. Ct., 130; 64 L. Ed. 258 are not in point. These cases merely hold that an employee engaged in Interstate Commerce is not entitled to an award under a State Compensation Act. It will be noted that the Federal Employers' Liability Act imposes liability only where the defendant is negligent. The State Statutes involved in the cases supra impose liability regardless of negligence. There is therefore a decided conflict in the two statutes, and the Federal Act necessarily superseded them. In the case at bar there is no conflict in the two statutes. While these cases announce good law, they can not and do not have any possible application to the facts existing in the case at bar.

The case of New Orleans and N. E. R. Co. vs. Harris, 247 U. S. 367; 38 Sup. Ct., 535; 62 L. Ed. 1,167 is not in point. In that case the Court held that a statute of the State of Mississippi providing that proof of injury was prima facie evidence of negligence, had no application to an action under the Federal Act. This opinion goes into the question quite exhaustively and finds as a matter of fact that there is a decided conflict in the Federal Act and the Statute therein involved, for it expressly holds that under one act the plaintiff to succeed must affirmatively establish negligence; while under the other he is only required to show a certain state of facts from which the

Statute will infer negligence. The basis of this case, as is ably pointed out in the opinion, is that the Federal Act supersedes the state statute for the reason that there is a direct conflict between the two statutes, and necessarily the Federal Act will in such cases control. In the case at bar, however, respondent affirmatively established the negligence of petitioner, and there being no conflict between the two statutes, the Kentucky Child Labor Act applies to this case.

Nor does the case of Toledo, St. Louis and Western R. R. vs. Slavin, 236 U. S. 454; 35 Sup. Ct. 306; 59 L. Ed. 671 support contention of petitioner. In that case it is held that the suit should have been brought under the Federal Employers' Liability Act and not under the State Statute, and that this question could be raised by a motion for a directed verdict. This is the only proposition for which this case can be considered, and no other question was therein decided or raised. The cases of Chicago, etc. R. R. Co. vs. Coogan, 271 U. S. 472, Southern Railroad Company vs. Gray, 241 U. S. 333, and Central Vermont R. R. Co. vs. White, 238 U. S. 507 are not in point. In none of these cases was there any question about the application of a State Statute to a suit under the Federal Employers' Liability Act raised or decided.

The case of Michigan Cent. R. Co. vs. Vreeland, 227 U. S. 59; 33 Sup. Ct., 192; 57 L. Ed. 417 merely holds that the right of action created by the Employers' Liability Act in behalf of an injured interstate employee is extinguished by his death. The Federal Act and the State Statute attempted to be invoked in that

case were held to be in conflict, and that therefore the statute of the State did not apply. This is an entirely different question than is presented in the case at bar.

None of the cases which petitioner cites from this Honorable Court, individually or collectively support its contention. In each of them the Court found that the State and Federal Statute were in conflict with each other, and therefore very properly held that the State Statute did not apply. In the case at bar there is no conflict between the two statutes. Congress has failed to enact any legislation in regard to child labor, and therefore the States still have the power to require interstate carriers not to employ children of tender years. The Federal Act does not define the term negligence as used in that act. It is negligence to employ an infant in violation of a State Statute. We therefore respectfully submit that none of the cases cited by petitioner sustain in any way its contention.

We have carefully read the case of St. Louis, Francisco Ry. Co. vs. Conley (Ark) 241 S. W. 365, cited by petitioner. This case stands alone and unsupported by any authority. The opinion starts out by saying that Congress has the power to prohibit children from working in inter-state commerce, and then announced the strange and unheard of doctrine, that by the silence of Congress on the subject, that the States can not prohibit child labor in so far as inter-state commerce is concerned. Notwithstanding the Conley case supra it is now well settled that the States can regulate inter-state commerce in so far as its en-

actments are not inconsistent with the action of Congress, and when Congress fails to act on any given subject, the States have this power until Congress acts.

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The Conley case is in direct conflict with all the decisions of this Honorable Court. We submit that the case is predicated on faulty reasoning, and that it should be rejected as unsound.

The case of Smithson vs. Atchinson, T. & S. F. Ry. Co. 162 Pac. 111, relied on by petitioner is not in point. The Court merely holds in that case that the violation of a State Statute does not preclude a defendant in a suit brought under the Federal Employers' Liability Act from relying on the defense of Contributory negligence. At the time of the rendition of this opinion Contributory negligence was an absolute defense under the Federal Act. Under the State Statute Contributory negligence was not a defense if the Statute was violated. There was then a decided conflict in the two statutes, the one providing that Contributory negligence should be an absolute defense; the other with the provision that it should not be a defense. To say there is no conflict in the two acts therein construed is to ignore the very principle upon which the case was decided. In the Smithson case, the plaintiff did not rely on the violation of the statute as negligence, while in the case at bar respondent pleads and avers that the violation of such a statute is negligence. It will be noticed that in the instant case the Court

instructed the Jury both on contributory negligence and assumed risk. We therefore submit that the Smithson case relied on by petitioner does not in any way support contention of counsel.

Believing that the Petition for Certiorari is without merit, it is respectfully submitted for the respondent that the application therefor should be denied.

Respectfully,

GEORGE B. MARTIN,
JAMES AND HOBSON,
Counsel for Respondent.

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The violation by petitioner of Section 331 a-9, Kentucky Statutes, prohibiting the employment of children under sixteen years of age is negligence per se and is sufficient to authorize a recovery in an action brought under the Federal Employers' Liability Act to recover damages for an injury sustained by an infant while employed in violation of Section 331 a-9, Kentucky Statutes.

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II.

Since there is no Federal legislation regulating the employment of children in inter-state commerce, the several states have the power to enact laws prohibiting the employment of children of certain ages in inter-state commerce.

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